Nos. 98-1935 & 98-2021

Supreme Court, U.S.
FILED
AUG 27 1999
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DEJA VU OF NASHVILLE, INC., et al.,

Petitioners,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE, et al.,

Respondents.

and

D.L.S., INC., d/b/a DIAMONDS AND LACE SHOWBAR, et al.,

Petitioners,

v.

CITY OF CHATTANOOGA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT PAUL G. SUMMERS IN OPPOSITION

PAUL G. SUMMERS
Attorney General & Reporter
State of Tennessee

MICHAEL E. MOORE
Solicitor General

DARYL J. BRAND
Associate Solicitor General

STEVEN A. HART*
Special Counsel
Office of the Tennessee Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 741-3505

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Were the courts below correct in upholding the constitutionality of the Tennessee Public Indecency Act (1994 Tenn. Pub. Acts, Ch. 542), which prohibits public nudity and sexual acts in situations associated with deleterious secondary effects on the community?

LIST OF PARTIES

The parties in these cases, who were plaintiffs/appellants in the consolidated proceedings in the Sixth Circuit are: Petitioners Deja Vu of Nashville, Inc., John Christopher Cox, Good Times, Inc., Denise Benson, Delaina A. Caise, James Corbett Chick, d/b/a The Brass Stables, C & A Entertainment, Inc., and Dawn Pierce ("Deja Vu Petitioners," who filed Petition No. 98-1935); and D.L.S., Inc., d/b/a Diamonds and Lace Showbar, Ann Martin, Kim Tyndall, and Karen Chadwick ("Chattanooga Petitioners," who filed Petition No. 98-2021). The respondents are: Metropolitan Government of Nashville and Davidson County, Tennessee, Emmett Turner, and Paul G. Summers[1] ("Deja Vu Respondents" to Petition No. 98-1935); as well as, City of Chattanooga, Tennessee, and Attorney General Paul G. Summers ("Chattanooga Respondents" to Petition No. 98-2021).

There are no entities to report or list pursuant to Supreme Court Rule 29.6.

---

[1] In their official capacities pursuant to Fed. R. App. P. 43(c)(2) and Sup.Ct.R. 35.3: Paul G. Summers is substituted as Tennessee Attorney General, in place of Charles W. Burson; and Emmett Turner is substituted as Chief of Police for the Metropolitan Government of Nashville and Davidson County, in place of Robert E. Kirchner, Jr.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

ARGUMENT 5

I. FURTHER REVIEW OF THIS CASE IS UNNECESSARY BECAUSE TENNESSEE'S RESTRICTIONS ON PUBLIC NUDITY ARE CONSTITUTIONAL UNDER ANY OF THE THREE OPINIONS CONCURRING IN THE *BARNES* JUDGMENT 5

II. THIS IS NOT A SUITABLE CASE FOR REEXAMINATION OF THE CONCEPTS OF "CONTENT-NEUTRALITY" OR "SECONDARY EFFECTS." 10

III. THIS CASE DOES NOT PRESENT ANY ISSUE OF REAL AND SUBSTANTIAL OVERBREADTH 14

IV. REVIEW IS NOT NECESSARY TO DETERMINE WHETHER NUDE DANCING IN ADULT ENTERTAINMENT ESTABLISHMENTS IS ENTITLED TO ANY FIRST AMENDMENT PROTECTION AT ALL 17

V. THE PROCEDURAL MATTERS OF WHICH THE CHATTANOOGA PETITIONERS COMPLAIN DEMONSTRATE THAT THEIRS IS NOT A SUITABLE CASE FOR CONSIDERATION OF LARGER CONSTITUTIONAL MATTERS 17

CONCLUSION 19

TABLE OF CONTENTS – Continued

Page

APPENDIX ..... App. 1

Response of Defendant [Attorney General] Charles W. Burson as to Relevance of Certain Land Use Studies to Assertions by Nashville Federal Plaintiffs' Affiant Robert Bruce McLaughlin [proffered as evidence to United States District Court for Middle District of Tenn.]

TABLE OF AUTHORITIES

Page

CASES

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) . . *passim*

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 4

Colacurcio v. City of Kent, 163 F.3d 545 (9th Cir. 1998), *cert. petition filed*, June 23, 1999 (No. 98-2053) 9

International Eateries of America, Inc. v. Broward County, 941 F.2d 1157 (11th Cir. 1991) 9

J & B Entertainment, Inc. v. City of Jackson, 152 F.3d 362 (5th Cir. 1998) 9

Marks v. United States, 430 U.S. 188 (1977) 8

Paps A.M. v. City of Erie, 719 A.2d 273 (Pa. 1998), *cert. granted*, ___ U.S. ___, 119 S. Ct. 1753, 143 L. Ed. 2d 786 (May 17, 1999, No. 98-1161) 10, 14

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 8, 9, 11, 12, 13, 14

Roberts v. Clement, 252 F. Supp. 835 (E.D. Tenn. 1966) 3

Triplett Grille, Inc. v. City v. Akron, 40 F.3d 129 (6th Cir. 1994) 8, 9

United States v. O'Brien, 391 U.S. 367 (1968) 7, 8, 11, 13, 17

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 11

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) 15

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Indiana Code § 35-45-4-1 (1988) 6

Tenn. Code Ann. § 39-13-511 12

Tenn. Code Ann. § 39-13-511(a)(2)(A) 6, 7

Tenn. Code Ann. § 39-13-511(a)(5) 15, 16

Tenn. Code Ann. §§ 39-17-901 *et seq.* 15

COURT RULES

Fed. R. App. P. 43(c)(2) ii

Sup. Ct. R. 35.3 ii

OTHER AUTHORITY

Tennessee Public Indecency Act (1994 Tenn. Pub. Acts, Ch. 542) ..... *passim*

STATEMENT OF THE CASE

Tennessee's Public Indecency Act, as amended by 1994 Tenn. Pub. Acts, Ch. 542 ("Chapter 542"), is substantially similar to the Indiana public indecency law upheld by this Court in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). The preamble and legislative history of Chapter 542 demonstrate that the act was passed by the Tennessee Legislature in the wake of, and in reliance upon, this Court's opinion in *Barnes*. *See, e.g.*, Chapter 542 Preamble, Deja Vu App. 126-127 (referencing this Court's ruling regarding the constitutionality of a similar public indecency act, and noting that, for the promotion of the general welfare, health, safety, and morals of the community, the amendments were necessary to address deleterious secondary effects of sexual-oriented businesses and certain public nudity as well as to protect "social order and morality"). The District Court found that the Tennessee Legislature enacted Chapter 542 in response to this Court's decision in *Barnes*. Deja Vu App. 24-25.

The petitioners in this consolidated multi-district litigation initiated a facial challenge to Chapter 542 before its effective date. Law enforcement authorities had not attempted to enforce the statute against the petitioners, who are various purveyors of nude and/or semi-nude dancing in Tennessee.

The procedural history of this consolidated litigation is set forth in the District Court's opinion granting the defendants summary judgment (Deja Vu App. 14-17), and in the Sixth Circuit's opinion affirming that decision (Deja Vu App. 1-3).

Although the District Court initially denied the Deja Vu Petitioners' motion for preliminary injunction (Deja Vu App. 71-82), the Sixth Circuit reversed the District Court's denial and remanded the case. Deja Vu App. 67-70. Following extensive briefing and oral argument, upon cross-motions to dismiss and/or for summary judgment, the District Court found that "Chapter 542 does not violate Plaintiffs' right to free expression guaranteed under the First Amendment to the United States Constitution" or the Tennessee Constitution. Deja Vu App. 37-38.

The Deja Vu Petitioners complained that, because of exceptions provided within Chapter 542, the act is not a law of general applicability, and contended further that the act is not "content-neutral" as it allegedly affects erotic performance dance entertainment and nothing else. Deja Vu Petition pp. 3, 13. To the contrary, the District Court found that a fair reading of the preamble and the statute indicates that Chapter 542 is designed to address public nudity in general and that "nude barroom dancing is not the only activity prohibited by Chapter 542. Clearly, a plethora of unexcepted activities limited only by the reader's imagination are also prohibited."[2] Deja Vu App. 31-32.

---

[2] Further review of the act and the legislative history of Chapter 542 as a whole indicates that it is not a content-based regulation aimed at proscribing only nude dancing clubs. As set forth in the entire legislative history and in additional portions (not included in the Deja Vu Petitioners' Appendix) of the deposition of Mr. Nathan Ridley, an attorney in the office of Legislative Legal Services for the Tennessee General Assembly, at least some legislators were concerned with addressing public nudity in general as well as deleterious secondary effects.

Chapter 542 provides exceptions for "necessary public nudity"; such as in single-sex public restrooms, enclosed single-sex functional showers, locker and/or dressing rooms, enclosed motel rooms, doctors' offices, "portions of hospitals and similar places in which nudity or exposure is necessary and customarily expected outside of the home and in the sphere of privacy constitutionally protected therein;" and in other situations where deleterious secondary effects are not generally recognized. These situations include a "modeling class" operated at certain accredited institutions and private facilities that are formed as a "family oriented clothing optional facility." (As noted by the District Court, this exception likely was included as the legislature was previously unsuccessful in attempting to criminalize "operation of a nudist colony." *See Roberts v. Clement*, 252 F.Supp. 835 (E.D. Tenn. 1966)). Deja Vu App. 31. The inclusion of a "theatrical production" exception is consistent with an effort to avoid prohibiting public nudity in certain situations not generally associated with deleterious secondary effects, such as non-obscene artistic presentations in theatrical settings.

The District Court found that inclusion of the Chapter 542 exceptions bears "a rational relationship to the asserted governmental interest in enacting Chapter 542, and, therefore, Chapter 542 does not violate the Equal Protection Clause of the Fourteenth Amendment." Deja Vu App. 41. Further, the District Court found that Chapter 542 contains reasonable and adequate definitions, which are more precise than the language of many other public indecency statutes and are not void for vagueness. Furthermore, no real or substantial overbreadth was

found in relation to Chapter 542's legitimate sweep. Deja Vu App. 45-55, applying *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Substantially similar challenges were also rejected by the District Court in regard to the City of Chattanooga's anti-nudity ordinances. Deja Vu App. 55-60.

The Court of Appeals for the Sixth Circuit, in a *per curiam* decision not recommended for full-text publication, affirmed the District Court's ruling. The Sixth Circuit held "that Chapter 542 does not restrict speech based on a disagreement with the message it conveys in violation of the Constitution, but is instead aimed with adequate precision at combating secondary crime effects." Deja Vu App. 1. The appellate court determined Chapter 542 to be "content-neutral" as it "is fueled by the motivation of curbing the associated criminal effects of nude dancing [establishments], . . . such as sexual assault, prostitution, and other criminal activity." Deja Vu App. 4. The Sixth Circuit concluded that "the type of restricted activity present in Chapter 542 is nearly identical to that in *Barnes*." Deja Vu App. 6. The Sixth Circuit followed Justice Souter's concurring opinion in *Barnes* in analyzing Chapter 542. "It follows that because Chapter 542 is a content-neutral restriction on free speech that meets all four prongs of the *O'Brien* test and therefore comports with the tenets of *Barnes*, it does not violate the First Amendment right to freedom of expression." Deja Vu App. 7. Further, the Sixth Circuit rejected vagueness, overbreadth, equal protection, and due process challenges to Chapter 542. Deja Vu App. 7-10.

Petitions requesting rehearing *en banc* were denied by the Sixth Circuit. Deja Vu App. 124. Justice Stevens

denied a petition by Deja Vu to stay the mandate of the Sixth Circuit pending the filing of a petition for a writ of certiorari.

ARGUMENT

I. FURTHER REVIEW OF THIS CASE IS UNNECESSARY BECAUSE TENNESSEE'S RESTRICTIONS ON PUBLIC NUDITY ARE CONSTITUTIONAL UNDER ANY OF THE THREE OPINIONS CONCURRING IN THE *BARNES* JUDGMENT.

The District Court correctly found that Tennessee's Public Indecency Act, 1994 Tenn. Pub. Acts, Ch. 542, was enacted in the wake of and in reliance upon this Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). Deja Vu App. 24-25. Because the Tennessee act is substantially similar to the Indiana statute upheld in *Barnes*, both the District Court and the Court of Appeals for the Sixth Circuit relied upon the *Barnes* decision in upholding Chapter 542. The Sixth Circuit's *per curiam* unpublished decision in this case is thus perfectly in line with this Court's precedents.

The petitioners' main contention now is that because of the fragmented nature of the *Barnes* decision – with a three-justice plurality and two separate concurring opinions – *Barnes* should be reexamined. Upon such reexamination, the petitioners argue that the Court should effectively reverse *Barnes*, and follow the dissenting view adopting strict scrutiny as the standard for evaluating any restrictions on nude dancing. Despite any possible questions as to which is the controlling rationale of the

Barnes decision, however, the result in *Barnes* was crystal clear: a statute substantially identical to Tennessee's Chapter 542 was upheld against First Amendment challenge.

At issue in *Barnes* was an Indiana statute criminalizing the act of "knowingly or intentionally, in a public place," appearing "in a state of nudity." *Barnes*, 501 U.S. at 569, n. 2; Indiana Code § 35-45-4-1 (1988). "Nudity" was defined as

> the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

Id.

Tennessee's Chapter 542 likewise provides that "[a] person commits the offense of public indecency who, in a public place . . . knowingly or intentionally . . . appears in a state of nudity. . . . " 1994 Tenn. Pub. Acts, Ch. 542, § 1, codified at Tenn. Code Ann. § 39-13-511(a)(1)(A). The statute specifies that

> "Nudity" or "state of nudity" means the showing of the bare human or female genitals or pubic area with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of the areola, or the showing of the covered male genitals in a discernibly turgid state. "Nudity" or "state of

> nudity" does not include a mother in the act of nursing the mother's baby. . . .

Tenn. Code Ann. § 39-13-511(a)(2)(A).

In *Barnes*, the three-justice plurality saw the nude dancing at issue there (and in this case) as "expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." *Barnes*, 501 U.S. at 565. The plurality recognized that Indiana's statute did not ban nude dancing as such, but only as part of a more general proscription of public nudity, with "incidental limitations on some expressive activity." *Id.*, 501 U.S. at 566, 567. The plurality therefore followed the familiar four-part intermediate scrutiny test of *United State v. O'Brien*, 391 U.S. 367 (1968), for evaluating the constitutionality of restrictions on conduct including both speech and nonspeech elements. *Id.* Finding that "the statute's purpose of protecting societal order and morality is clear from its text and history," the plurality viewed those interests as "unrelated to the suppression of free expression." *Id.*, 501 U.S. at 568, 570. The plurality concluded that the "societal disapproval of nudity in public places and among strangers" was a proper governmental interest, served by the narrowly-tailored statute, that justified the incidental restriction on First Amendment freedom. *Id.*, 501 U.S. at 571-572.

In a separate opinion concurring in the judgment, Justice Scalia opined that because the Indiana statute was a general law not specifically aimed at expressive conduct, it did not implicate the First Amendment at all. *Id.*, 501 U.S. at 576. Justice Scalia concluded that "moral

opposition to nudity supplies a rational basis for its prohibition." *Id.*, 501 U.S. at 580.

Justice Souter also concurred separately in the judgment, agreeing with the plurality that nude dancing is subject to "a degree" of First Amendment protection, and that the four-part *O'Brien* analysis was appropriate to judge the validity of a statute "burdening expressive acts as distinct from pure speech or representation." *Id.*, 501 U.S. at 581-582. Justice Souter concluded, however, that the statute was constitutionally justified by the state's "substantial interest in combating the secondary effects of adult entertainment establishments," such as the crime associated with such businesses, rather than by "the possible sufficiency of society's moral views." *Id.*, 501 U.S. at 582, 583. In considering such "secondary effects," Justice Souter relied on the similar analysis in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), upholding a zoning ordinance restricting adult entertainment businesses.

In this case, the Sixth Circuit followed Justice Souter's *Barnes* opinion and applied the *O'Brien* intermediate scrutiny analysis. Deja Vu App. 4. The court noted that, under *Marks v. United States*, 430 U.S. 188, 193 (1977), when the Supreme Court issues a decision in which no opinion garners a majority, the opinion of the Justice concurring in the judgment on the "narrowest grounds" should be regarded as the Court's holding. Deja Vu App. 4; *Triplett Grille, Inc. v. City v. Akron*, 40 F.3d 129, 133 (6th Cir. 1994). Because Justice Souter's "secondary effects" analysis imposed the most stringent First Amendment analysis of the three opinions concurring in the judgment, the Sixth Circuit properly viewed his opinion as constituting the Court's holding in *Barnes*.

The Chattanooga petitioners concede that the majority of courts follow the view that Justice Souter's opinion represents the *Barnes* holding. Chattanooga Petition at 12. *See Triplett Grille*, 40 F.3d at 134; *International Eateries of America, Inc. v. Broward County*, 941 F.2d 1157, 1160 (11th Cir. 1991). Still, the petitioners argue that certiorari is warranted here because of conflicts among courts on that point. They cite cases expressing confusion regarding the separate opinions in *Barnes*. *Colacurcio v. City of Kent*, 163 F.3d 545, 550 (9th Cir. 1998), *cert. petition filed* June 23, 1999 (No. 98-2053); *J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 370 (5th Cir. 1998). The Fifth Circuit in *J & B* nonetheless followed Justice Souter's *Barnes* opinion. *J & B*, 152 F.3d at 370. Similarly, in *Colacurcio*, the Ninth Circuit followed the *Renton* "secondary effects" analysis. *Colacurcio*, 163 F.3d at 551.

After careful application of Justice Souter's reasoning, the lower courts in this case found that the same secondary effects that justified the Indiana statute in *Barnes* also supported the near-identical provisions of the Tennessee Public Indecency Act. Certainly, upon consideration of the *Barnes* plurality opinion, the Sixth Circuit would also have found that Tennessee's act, like Indiana's, appropriately served a state interest in protecting societal order and morality. *Barnes*, 501 U.S. at 568, 570-572. Even more certainly, the Sixth Circuit would have found that the statute was rationally based on the State's interest in moral opposition to nudity, as Justice Scalia opined in *Barnes*. *Id.*, 501 U.S. at 580. Because the Tennessee statute, like Indiana's, would have passed constitutional muster under any of the three opinions concurring in the *Barnes* judgment, this case does not present

a useful opportunity, and there simply is no need, for reexamination of which opinion constitutes the controlling *Barnes* rationale.

To the extent that the petitioners and their compatriots in the nude dancing industry seek a vehicle for arguing, contrary to *Barnes*, that strict scrutiny should be the test for any restrictions on their conduct, such a case is already before this Court. *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998), *cert. granted*, ___ U.S. ___, 119 S.Ct. 1753, 143 L.Ed.2d 786 (May 17, 1999, No. 98-1161). In *Pap's*, the Pennsylvania Supreme Court, in an unusual three-two split, essentially adopted the dissenting opinion in *Barnes* as the controlling precedent. *Id.*, 719 A.2d at 279.

Any question regarding the proper interpretation and application of the *Barnes* decision, or the validity of the *Barnes* dissent, is thus apparently presented in *Pap's*. Further review of the Sixth Circuit's decision in this case, which closely followed the *Barnes* judgment, is unnecessary. If the *Barnes* judgment, upholding the Indiana public indecency statute, is to have any *stare decisis* effect at all, the Sixth Circuit decision upholding the closely similar Tennessee act should not be disturbed.

II. THIS IS NOT A SUITABLE CASE FOR REEXAMINATION OF THE CONCEPTS OF "CONTENT-NEUTRALITY" OR "SECONDARY EFFECTS."

The petitioners argue that Chapter 542's proscription of public nudity is content-specific and therefore should have been subjected to strict scrutiny analysis instead of

the *O'Brien* intermediate scrutiny review. To the contrary, the Sixth Circuit found that the goals of preventing crime, disease, and other deleterious effects are content-neutral. Deja Vu App. 4. Looking to the purposes expressed in Chapter 542's preamble, the court found that the content-neutral motivation of curbing sexual assaults, prostitution, and other associated criminal activity fueled the statute's enactment. Deja Vu App. 4. *See* Deja Vu App. 126-127.

The Sixth Circuit's ruling is consistent with this Court's precedents. *Barnes*, 501 U.S. at 585-586 (Souter, J., concurring); *Renton*, 475 U.S. at 48. A law is "content-neutral" if it is "justified without reference to the content of the regulated speech." *Renton*, 475 U.S. at 48, quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976). If a law serves purposes unrelated to the content of expression, it is content-neutral "even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Even if "a motivating factor" in enacting the law was to restrict some expression, the law is still content-neutral if it can be justified by purposes unrelated to the content of speech. *Renton*, 475 U.S. at 47-48.

The petitioners argue that the *Renton* "secondary effects" analysis, applied by Justice Souter in his *Barnes* concurrence, has created confusion and conflict in other cases as to the meaning of "content-neutrality." The petitioners admit, however, that the Sixth Circuit decision adheres to the *Renton/Barnes* "secondary effects" approach. Deja Vu Petition at 12. Any conflicts with this Court's precedents, therefore, are presented not by this decision but by other cases.

In any event, this case is not a suitable one to reexamine the concept of content-neutrality, because, as with the Indiana statute in *Barnes*, the text and history of Tennessee's Chapter 542 expressly focused on the conduct of public nudity, not on any expression of opinion, message, or other content. The express language of the statute proscribes appearing in a "state of nudity" in a public place, without any reference to expression or message, and without reference even to nude dancing, although such activity comes within its sweep. Tenn. Code Ann. § 39-13-511. As the lower courts found, the preamble of Chapter 542, while referring to nude dancing, expressed legislative purposes of curtailing increased crime associated with nude dancing businesses, such as prostitution and sexual assaults, as well as combating urban blight and decreases in property values and quality of life. Deja Vu App. 126-127. In the District Court proceedings, the State asserted that caselaw and experience of other jurisdictions, including studies, link such adverse secondary effects to adult-oriented business establishments. App. 3-8; *see also* Deja Vu App. 333-335.

The petitioners argue that evidence supports a finding that Chapter 542 was aimed at nude dancing establishments. Even if that assertion were true, it does not establish that the act was targeted at any particular message or content, but only on the conduct of public nudity as it occurs in such an establishment. Further, at most, the petitioners' assertion would only demonstrate "a motivating factor," insufficient to destroy the express content-neutral purposes of the act. *Renton*, 475 U.S. at 47-48. As Justice Souter observed in *Barnes*,

> At least as to the regulation of expressive conduct, "[w]e decline to void [a statute] essentially on the ground that it is unwise legislation which [the legislature] had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it."

Barnes, 501 U.S. at 583 (Souter, J., concurring) quoting *O'Brien*, 391 U.S. at 384.

In a vein similar to their argument regarding content-neutrality, the petitioners argue that, in the wake of *Renton* and *Barnes*, the courts are in conflict as to whether a state must empirically prove the existence of secondary effects necessary to justify a restriction on nudity. Apparently, no studies or other proof were presented to the Indiana legislature in *Barnes*. *Id.*, 501 U.S. at 567-568. The Sixth Circuit concluded that affirmative evidence of secondary effects is not necessary. Deja Vu App. 4. As Justice Souter put it,

> Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional.

Barnes, 501 U.S. at 582 (Souter, J., concurring).

Thus, in *Renton*, the city was not required to justify its restrictions on adult theaters by producing empirical studies proving that particular problems were caused by such establishments. Instead, the city was entitled to rely on the experiences of other jurisdictions, without localized proof. *Id.*, 501 U.S. at 583-584; *Renton*, 475 U.S. at

51-52. In this case, as the District Court found, the Tennessee legislature relied upon this Court's decision in *Barnes* involving the experience of Indiana in enacting a closely similar statute aimed at the same types of secondary effects. Deja Vu App. 24-25.

The Sixth Circuit's "secondary effects" analysis is correct and consistent with *Barnes*, *Renton*, and this Court's other underlying precedents. Especially because the text and circumstances of the Tennessee act are so close to those of the Indiana statute upheld in *Barnes*, this case does not present a useful vehicle for examining other aspects or consequences of "secondary effects" doctrine.

III. THIS CASE DOES NOT PRESENT ANY ISSUE OF REAL AND SUBSTANTIAL OVERBREADTH.

The petitioners argue that certiorari should be granted because this case raises a facial overbreadth challenge not presented in the *Pap's* case already before the Court. Their overbreadth contentions center on their assertion that, because of lower court confusion over the *Barnes* holding, the secondary effects analysis could be employed to restrict pure verbal speech as well as conduct such as nude dancing in adult entertainment venues.

Even if the petitioners' characterizations were true, however, this case does not present such a problem. Tennessee's Chapter 542 proscribes the act of appearing nude in a public place. The language of Chapter 542 plainly reaches only conduct, and simply does not affect in any way pure verbal speech. The petitioners' argument on this point is with the *Barnes* and *Renton* secondary

effects analysis, not with Tennessee's statute. If the secondary effects doctrine were extended to justify restrictions on pure verbal speech, or even restrictions on clothed dancing as petitioners suggest, such an issue would have to arise in some other case examining some other statute.

A facial overbreadth challenge can only be maintained if the challenged statute's deterrent effect on legitimate expression is "both real and substantial" and if the statute is not "readily subject to a narrowing construction by the state courts." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976). The plain language of Chapter 542 presents no "real and substantial" deterrent to pure verbal speech. The petitioners' overblown hypothetical extensions of the *Barnes* holding are unrelated to the Tennessee statute at issue in this case. Therefore, this is not a suitable case for consideration of interplay of the overbreadth and secondary effects doctrines.

In a related argument, the petitioners claim that the "theatrical production" exception to Tennessee's Public Indecency Act could violate equal protection. Tenn. Code Ann. § 39-13-511(a)(5) provides that the proscription of public nudity does not apply "to any theatrical production which contains nudity . . . performed in a theater by a professional or amateur theatrical or musical company which has serious artistic merit." The exception is subject to the proviso that such production is not in violation of Tennessee's obscenity laws, Tenn. Code Ann. §§ 39-17-901 *et seq.* As the petitioners would have it, the secondary effects doctrine "makes no rational sense" if they could avoid the public nudity proscription by qualifying under the theatrical production exception.

Of course, any rational reading of Chapter 542 indicates that the theatrical production exception is grounded in a finding that the deleterious secondary effects associated with most public nudity, including the sexually exploitive adult entertainment business, are not associated with theatrical productions such as those described in Tenn. Code Ann. § 39-13-511(a)(5). *See Barnes*, 501 U.S. at 585, n. 2 (Souter, J., concurring). Indeed, this Court has suggested that such an exception for nudity in legitimate theatrical works (or a judicial limiting construction to the same effect) may, far from creating an overbreadth or equal protection problem, actually be necessary to save a public indecency statute from an overbreadth challenge. *See Barnes*, 501 U.S. at 533, n. 1 (plurality), 501 U.S. at 585, n. 2 (Souter, J., concurring). The Sixth Circuit in this case properly concluded that the theatrical production exception helps Chapter 542 avoid an overbreadth problem. Deja Vu App. 10.

In any event, this case presents no ripe issue regarding Chapter 542's theatrical production exception. The Deja Vu plaintiffs sought in the District Court a declaration that they qualified under that exception, but the District Court reserved that issue pending disposition on appeal of the other issues in this case. Deja Vu App. 121. The other plaintiffs apparently never sought to qualify under the theatrical production exception. Therefore, neither the lower federal courts nor Tennessee state courts have yet considered the construction and application of the theatrical exception in this case. Consideration of that exception at this point would thus be without the benefit of any lower court findings or analysis, and could well become a merely academic exercise.

IV. REVIEW IS NOT NECESSARY TO DETERMINE WHETHER NUDE DANCING IN ADULT ENTERTAINMENT ESTABLISHMENTS IS ENTITLED TO ANY FIRST AMENDMENT PROTECTION AT ALL.

Petitioners complain that the Sixth Circuit in another case treated as still open for debate whether nude dancing is entitled to any First Amendment protection at all. This case turns on no such issue, however. The Sixth Circuit decision in this case expressly followed Justice Souter's *Barnes* concurrence, and applied the *O'Brien* First Amendment analysis of restrictions reaching both protected speech and nonspeech elements. Deja Vu App. 4. Justice Souter in *Barnes* agreed with both the plurality and the dissenters that nude dancing even of the type involved here is entitled to a degree of First Amendment protection. *Barnes*, 501 U.S. at 581 (Souter, J., concurring). If the petitioners are aggrieved by other Sixth Circuit decisions they read as denying any First Amendment protection to their activities, this is not the appropriate case to present such an issue.

V. THE PROCEDURAL MATTERS OF WHICH THE CHATTANOOGA PETITIONERS COMPLAIN DEMONSTRATE THAT THEIRS IS NOT A SUITABLE CASE FOR CONSIDERATION OF LARGER CONSTITUTIONAL MATTERS.

The Chattanooga petitioners' case originated in the Eastern District of Tennessee. They requested and, over respondents' objections, were granted by the Judicial Panel on Multidistrict Litigation transfer to the Middle District as a "tag-along" action for consolidation with the

other cases which were then already much further along in their proceedings. Now the Chattanooga petitioners complain that, due to procedural confusion stemming from their late arrival, they were denied full opportunity to brief and argue issues.

The Chattanooga petitioners' complaints of procedural irregularities were implicitly rejected by the Sixth Circuit, which addressed the larger issues of the case on the merits. The petitioners have not now demonstrated that the Sixth Circuit's action misapplied any precedents of this Court, or was in conflict with other decisions. Similarly, they have demonstrated no real prejudice from the lower courts' action. If anything, the procedural confusion of which the Chattanooga petitioners complain, assuming arguendo that such complaints have any merit at all, demonstrates that theirs is not a "clean" case for determination by this Court of the larger issues the petitioners wish to raise.

CONCLUSION

The petitions for writ of certiorari should be denied.[3]

Respectfully submitted,

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

DARYL J. BRAND
Associate Solicitor General

STEVEN A. HART*
Special Counsel
Tennessee Attorney General's Office
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 741-3505

**Counsel of Record*

---

[3] The Metropolitan Government of Nashville and Davidson County and Emmett Turner, through their counsel, join in the filing of this opposition to issuance of a writ of certiorari.

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

IN RE STATE OF TENNESSEE PUBLIC INDECENCY STATUTE LITIGATION	))))	MDL DOCKET NO. 1031 ALL CASES JUDGE ECHOLS

RESPONSE OF DEFENDANT CHARLES W. BURSON AS TO RELEVANCE OF CERTAIN LAND USE STUDIES TO ASSERTIONS BY NASHVILLE FEDERAL PLAINTIFFS' AFFIANT ROBERT BRUCE McLAUGHLIN

As authorized by this Court prior to the hearing on the cross-motions for summary judgment, Defendant, Charles W. Burson, respectfully submits that "Exhibits to Response of Defendants Charles W. Burson and Metropolitan Government of Nashville and Davidson County and Opposition to Plaintiff's Motion for Summary Judgment, Volume II,"(Defendants' Ex. Vol. II) consisting of various land use studies and other information from other jurisdictions relating to adult entertainment establishments, are relevant and responsive to allegations by Plaintiff's [sic] affiant Robert Bruce McLaughlin. Therefore, even though Plaintiffs are withdrawing the Nashville Plaintiff's [sic] Statement of Facts, No. 7, these studies should be not be stricken from the record. This Court allowed Defendant an opportunity to further assert that the Volume II exhibits are relevant to addressing issues and assertions raised by the Nashville Federal Plaintiffs through affiant Robert Bruce McLaughlin to the effect that in general there is no convincing evidence that

sexually-oriented businesses have deleterious secondary effects on the community. (See McLaughlin Affidavit [Deja Vu App. 237-91], ¶s 28-33, 42, 23-24, 54, 73-77, 110).

The Nashville Federal Plaintiffs have "opened the door" to the relevance of these studies, by submitting an alleged expert offering his opinion of the reliability and soundness of these and other studies from other jurisdictions on the secondary effects of adult entertainment establishments. Indeed, in Exhibit B to the McLaughlin Affidavit, there is a list of 47 studies from other jurisdictions that Mr. McLaughlin reviewed and analyzed, including all but one (May 1, 1990 City of Tucson AZ Report) of the studies proffered as Defendant's Exhibit Volume II. However, copies of these studies have not been submitted into the court record by Plaintiffs. Plaintiffs now assert that although they have submitted their alleged experts' opinion of these studies, it is not relevant for the Court to have an opportunity to examine those studies for itself. Such an examination is clearly relevant and responsive to Plaintiffs' assertions that the studies are not convincing proof or reliable information for legislative bodies to consider as showing a relationship between adult uses and adverse secondary effects. (See McLaughlin Affidavit ¶s 28, 32-33, 73 and 77). This Court is not bound to blindly accept Plaintiffs' alleged expert's opinion as to the accuracy, reliability, and relevance of these and other studies from other jurisdictions.

SUMMARY OF VOLUME II LAND USE STUDIES AND REPORTS

Affiant McLaughlin in one section of his affidavit addresses "The Studies", as set forth in Exhibit B to his affidavit, which were prepared by or for various other local and state governments, which purport to establish a causal relationship between adult uses and adverse secondary effects targeted by Chapter 54 (McLaughlin Affidavit, ¶ 73). Mr. McLaughlin then states his opinion as to the questionable reliability of the studies and that they do not prove a causal relationship between adult uses and adverse secondary effects (McLaughlin Affidavit, ¶s 74-77). As noted, the approximately 47 studies affiant McLaughlin reviewed include those contained within Defendant's Exhibit, Volume II.

At the oral argument on the motions, the Court requested that Defendant submit some specific references to particular portions of the studies in Defendant's Exhibit Volume II as an aid to the Court in identifying the more significant portions. Therefore, Defendant submits this summary of significant points as a guide for the Court in making its own review of the studies.

Defendant's Exhibit Volume II begins with a "Summary of Land Use Studies Relating to Secondary Effects of 'Adult' Businesses." (Defendant's Ex. [proffered to the District Court] Vol. II, pp. 154-165). This "summary" is a review of fourteen land use studies and reports from 1977 through 1991 by various local jurisdictions. This Court is directed specifically to review the "Findings" or "Crime" or "Real estate" sections of the summary of each land use study. These sections set forth the other jurisdictions'

experiences that: (1) crime generally increased with the opening or expansion of adult businesses and (2) residential and commercial real estate property values were depreciated by adult businesses locating and operating nearby.

The "Adams County (Brighton, Colorado) Nude Entertainment Study", conducted in 1991, is a study of six representative locations (out of twenty-eight total locations involved in nude entertainment) during 1986 through 1988. The Sheriff's Department study found that in 1986 and 1987, 66% of all reported robberies took place at the three adult bookstores, with seven homicides directly attributable to adult bookstores and nude entertainment establishments. Many arrestees near these adult entertainment businesses had a history of prior arrests for morals' crime, sexual assaults, alcohol related arrests, and crimes of violence. (Defendant's Ex. Vol. II, pp. 168-169).

The City of Austin prepared a "Report on Adult Oriented Businesses in Austin" in May 1986. (Defendant's Ex. Vol. II, pp. 190-241). This report contained a summary and analyses of reports from other local jurisdictions regarding the association between increased crime and the negative impact on surrounding land uses and property values caused by adult businesses. (Defendant's Ex. Vol. II, pp. 197-199). At that time, Austin had 49 adult oriented businesses. The City of Austin analyzed crime rates by comparing areas with adult business with areas without adult businesses. Within the study areas containing adult businesses, sex-related crimes were found to be from one to nearly five times the citywide average. Also sex-related crime rates were found to be 66% higher in study areas with two adult businesses as opposed to one

adult business. (Defendant's Ex. Vol. II, pp. 194, 204-219). Furthermore, in order to assess the impact of adult businesses on property values, one hundred twenty-eight real estate appraisal and lending firms received questionnaires. Eight-eight percent (88%) of the respondents indicated a belief that adult bookstores (like other adult businesses) would decrease residential property values within one block, and 59% felt that property values would decrease within three blocks. (Defendant's Ex. Vol. II, pp. 194, 219-222). (Conclusion summarized on page 227).

The City of Beaumont, Texas, September 14, 1982, Planning Department Report on Regulation of Adult Uses notes that the city's police department concluded that adult entertainment establishments were frequent scenes of illegal sexual activities, such as prostitution and the sale and use of narcotics. Such criminal activity was above average in areas near adult establishments, as were crimes against persons, such as mugging. (Defendant's Ex. Vol. II, pp. 245-246). Furthermore, the City of Beaumont described the downhill economic decline in a neighborhood caused by the presence and concentration of adult entertainment businesses. (Defendant's Ex. Vol. II, p. 245).

The Houston City Council prepared a legislative report on "Proposed Regulation of Sexual Oriented Businesses" in 1983. They conducted a series of public hearings at which testimony was received. During those hearings, neighborhood representatives and real estate brokers offered documented instances in which property values have been adversely affected by the establishment of sexual oriented businesses in certain communities. It

was noted that sexual oriented businesses have a detrimental effect on property values, at least in part because they are perceived to adversely affect the quality of life. (Defendant's Ex. Vol. II, p. 256). Furthermore, representatives of the Police Department testified and confirmed that sexually oriented businesses are likely contributory factors to criminal activities that are encouraged as ancillary to those enterprises. (Defendant's Ex. Vol. II, p. 257).

In June 1977, the City of Los Angeles, Department of Planning, released a "Study of the Affects [sic] of the Concentration of Adult Entertainment Establishments in the City of Los Angeles". (Defendant's Ex. Vol. II, pp. 284-387). In regards to the effect of "adult entertainment" businesses on the community, the report found that the Los Angeles Police Department noted a link between the concentration of adult oriented businesses, particularly in the "Hollywood" community, and increased crime. (Defendant's Ex. Vol. II, pp. 288, 353-360). In the police study, Part I Crimes (criminal acts against persons, including homicide, rape, aggravated assault, robbery, burglary, larceny and vehicle theft) increased in the Hollywood area (which had a concentration of adult oriented businesses) by 7.6% while the whole city showed only a 4.2% increase from 1969 through 1975. In particular street robberies and purse snatchings, increased by 93.7% and 51.4% respectively in Hollywood as compared to the city wide increase of 25.6% and 36.8%. Other offenses (such as fraud, prostitution, narcotics, gambling, and other misdemeanors) increased in Hollywood by 45.5% while the city rose but 3.4%. Hollywood area prostitution arrests increased at a rate of 372.3% versus 24.5% for the rest of

the city from 1969 through 1975. (Defendant's Ex. Vol. II, pp. 354-360).

Affiant McLaughlin (in ¶75) correctly notes that when empirically comparing changes in assessed property evaluations within study areas, the Los Angeles planning staff opined that it "would appear to be insufficient evidence to support the contention that concentration of sexual-oriented businesses have been the underlying primary cause" of the decreases in property value in the study areas between 1970 and 1976. The comparison did show that property values in areas containing concentrations of adult-oriented businesses have "generally tended to increase to lesser degree than similar areas without such concentrations." (Defendant's Ex. Vol. II, pp. 331-332). However, the Planning Department noted that responses to questionnaires to real estate representatives and appraisers indicated that in their opinions, concentration of adult entertainment businesses have a direct negative impact on property values. (Defendant's Ex. Vol. II, pp. 332, 338-349).

The City of Oklahoma City, Community Development Department, released in March, 1986 a survey of real estate appraisers regarding the effect of adult entertainment businesses in Oklahoma City. (Defendant's Ex. Vol. II, pp. 432-438). One hundred questionnaires were mailed to Oklahoma City real estate appraisers. The responses produced results consistent with the result of a national survey of a [sic] real estate appraisers conducted by the City of Indianapolis. Respondents overwhelmingly indicated that an adult bookstore would have negative effects on commercial and residential property values. Opinions did indicate that the negative effect on property

values would decrease as distance from the adult entertainment establishment increased. (Defendant's Ex. Vol. II, pp. 437-438).

A report by "Oklahomans Against Pornography" summarizes that, since the closing or dramatic change in the operation of several sexual-oriented businesses, a reduction in the number of rapes by 27% was noted. (Defendant's Ex. Vol. II, p. 439).

In May 1979, the City of Phoenix, Planning Department, released a study of adult businesses. (Defendant's Ex. Vol. II, pp. 441-458). The study by the City of Phoenix showed a relationship between arrests for sex offenses and the location of adult-oriented businesses. This project compared three study areas (communities with adult businesses) and three controlled areas (communities without adult businesses). (Defendant's Ex. Vol. II, pp. 442, 445-446).

CONCLUSION – OPPOSITION TO MOTION TO STRIKE

Defendant Burson again submits that under applicable case law as set forth in our Motion for Summary Judgment and Response in Opposition to the Plaintiff's Cross-Motions, the Tennessee Legislature did not need to specifically consider particular studies and formally introduce any studies into a legislative record in order for Chapter 542 to be constitutional. However, once plaintiffs have raised these broad allegations that no convincing evidence exists of deleterious secondary effects of adult entertainment establishments, it is clearly relevant and responsive to introduce into the record in this case some

land-use studies and other information, reviewed and referenced by Plaintiffs' affiant, regarding the deleterious secondary affects [sic] of adult entertainment establishments.

Defendant Burson has submitted with its earlier Response in Opposition to Motion to Strike **an original affidavit** of Ms. Betty Jackson in this action, which authenticates that these studies were received by Senator Rice's office.

Therefore, Defendant Burson submits this Court should find the Nashville Federal Plaintiffs' Motion to Strike and Objection to be without merit as these studies are relevant and responsive to the McLaughlin affidavit. Therefore Volume II Exhibit should remain in and be considered a part of the record on the Summary Judgment Motions.

Respectfully submitted,

CHARLES W. BURSON
Attorney General & Reporter

/s/ Steven A. Hart
STEVEN A. HART
B.P.R. # 7050
Special Counsel
Office of the Attorney General

* * *